Daufuskie Club, Inc., d/b/a Daufuskie Island Club and Resort, Inc. *and* International Union of Operating Engineers, Local 465, AFL–CIO. Case 11–CA–17334

May 14, 1999

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

On March 9, 1998, Administrative Law Judge Albert A. Metz issued the attached decision. The Respondent filed exceptions and a supporting brief, the Charging Party filed cross-exceptions and a supporting and responding brief, and the Respondent filed a rebuttal brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.[3]

[1] We deny as moot the Charging Party's motion for expedited proceeding.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's credibility findings concerning Regional Director of Human Resources Bruce Rosenberger, Member Brame disavows the judge's consideration for that purpose of the Respondent's policy statement concerning unions.

In adopting the judge's finding, at sec. III,C,4 par. 2, that Supervisor Richard Vaughan's references to "new blood" and "new faces" were euphemisms for employees other than Melrose's union-represented employees, Member Brame relies on Vaughan's direct statement, in explaining the Respondent's failure to hire a Melrose employee, that the Respondent could only hire a certain number of Melrose employees or it would have to recognize the Union. Further, in adopting the judge's finding at sec. IV,D, par. 1, that the Respondent's scrutiny of Melrose personnel files evidenced disparate hiring criteria, Member Brame notes that it is not per se unlawful for a successor employer to review and consider disciplinary notices issued by its predecessor.

[3] Although Member Brame agrees with the judge and his colleagues that the Respondent unlawfully discriminated against the Melrose employees as a group based on their union representation, he would not order reinstatement of the individual employees in the group in the absence of a showing by the General Counsel at the unfair labor practice hearing that the employees met the Respondent's enhanced qualifications, if any, for employment at the facility. Contrary to his colleagues, in Member Brame's view, the showing that the employees met the qualifications for the jobs for which they applied is an essential element of the General Counsel's prima facie case, for without this element no discrimination in hiring could have occurred. Member Brame does not find that the General Counsel has met this burden with respect to the 108 Melrose employees at issue here or even, contrary to his colleagues, that the issue has been fully litigated. The General Counsel presented evidence regarding some employees' experience and performance in their former positions with Melrose, and the Respondent, in rebuttal, presented evidence in support of its decisions not to hire specific employees. In Member Brame's view, this record is insufficient to establish the appropriateness of a reinstatement remedy as to the individual employees covered by the reinstatement order. If such a showing were made, Member Brame would find that the General Counsel has the burden in compliance of showing when the employees would have been hired by the Respondent in the absence of the unlawful discrimination, and Member Brame would order backpay commencing only on that date.

With respect to the question whether the discriminatees could meet "enhanced" qualifications established by the Respondent, Members Fox and Liebman note that the Respondent has already litigated the issue of the qualifications of Melrose employees who were passed over in the Respondent's hiring decisions. In the decision we are adopting, the judge found that the Respondent's refusal to hire them was motivated by union animus and that the Respondent had not shown that the "non-Melrose employees hired were superior in qualifications to the alleged discriminatees" nor had it otherwise established a *Wright Line* defense. Member Brame mistakenly treats the issue of whether the discriminatees would have met the Respondent's job qualifications as the General Counsel's burden of proof. Under *Wright Line*, however, it was, in fact, the r*espondent's* burden to prove that it would not have hired these discriminatees, notwithstanding their union activities, because they did not meet the respondent's qualifications for the job. The respondent had the opportunity to raise this defense at the hearing and, as the judge found, it failed to meet its burden. Moreover, a respondent is not permitted to relitigate in a compliance proceeding issues that have been litigated in the underlying unfair labor practice proceeding. *DMR Corp*., 289 NLRB 19 fn. 1 (1988); *Sumco Mfg. Co*., 267 NLRB 253, 254 fn. 2 (1983), enfd. 746 F.2d 1189 (6th Cir. 1984). Of course, the issue of when discriminatees would have been hired but for the Respondent's unlawful conduct may be litigated in compliance. See, e.g., *Laro Maintenance Corp*., 312 NLRB 155 fn. 3 (1993), enfd. 56 F.3d 224 (D.C. Cir. 1995); *Joyce Western Corp*., 286 NLRB 592, 600 (1987); and *Victoria Medical Group*, 274 NLRB 1006, 1008 (1985).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Daufuskie Club, Inc., d/b/a Daufuskie Island Club and Resort, Inc., Daufuskie Island, South Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Ronald C. Morgan, Esq., for the General Counsel.
Arch Stokes, Esq., Carol Burkett Hawkins, Esq., Christopher Terrell, Esq., and *Eric Hilton, Esq*., for the Respondent.
Helen L. Morgan, Esq., for the Union.

DECISION

ALBERT A. METZ, Administrative Law Judge.[1] This case involves questions of (1) Daufuskie Club, Inc., d/b/a Daufuskie Island Club and Resort, Inc.'s[2] (Respondent) denial of employment to 108 employees of a predecessor employer and (2) whether the Respondent could unilaterally set its employees' terms of employment and refuse to bargain with the International Union of Operating Engineers, Local 465, AFL–CIO (the Union). On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by all parties, I find that the Respondent has violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act).[3]

I. JURISDICTION AND LABOR ORGANIZATION

The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the

[1] This case was heard at Beaufort, South Carolina, on September 15–19, 22–26, October 28–31, and November 6, 1997.

[2] The name of the Respondent appears as amended at the hearing.

[3] 29 U.S.C. §158(a)(1), (3), and (5).

Union is a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND

A. Melrose Club

The facility involved in this case is a resort on Daufuskie Island, South Carolina. Prior to December 31, 1996, the resort was known as the Melrose Club.[4] The club operated recreational facilities, including golf, and room and restaurant accommodations. Additionally, the club had offices, a boat embarkation dock, and guest center called Salty Fare Landing on nearby Hilton Head Island. Daufuskie Island is accessible only by boat and the trip from Salty Fare Landing takes approximately 55 minutes.

On November 4, 1994, the Union was certified by the Board as the collective-bargaining representative of certain of the Melrose employees.[5] A collective-bargaining contract was eventually negotiated between the Union and Melrose with effective dates of August 9, 1996, to August 8,1998.

B. Respondent's Purchase of Melrose

In December 1996, the Respondent, a subsidiary of Club Corporation of America (CCA), agreed to purchase Melrose. The Respondent took over the facility effective December 31. In anticipation of the sale, Respondent sent CCA managers to meet with Melrose supervisors from late November through December.

The Union soon learned the facility was to be sold and sent a letter asking the Respondent to employ the Melrose employees and adopt the existing collective-bargaining contract. The Respondent refused to recognize the Union as its employees' bargaining agent and admittedly implemented its own terms and conditions of employment for its newly hired staff. These changes included rates of pay, fringe benefits, and the elimination of some unit jobs. The Respondent has continued to operate the club as a resort and has sought to emphasize its availability to the public.

C. Rating of Melrose Employees

Bruce Rosenberger is the Respondent's regional director of human resources. Rosenberger maintains his office in Pinehurst, North Carolina. He was responsible for the initial hiring at the Respondent's Daufuskie Island resort. Rosenberger first arrived at the Daufuskie Island facility in mid-December before the sale was finalized and remained until January 6. Early on, Rosenberger requested Amarien Snell-Baldwin, Melrose's personnel administrator, to prepare a list of the unit employees. He then met individually with the Melrose supervisors and had them rate each of their subordinates using a scale from 0 to 3. A score of 3 was the highest rating the Melrose employee could achieve. Rosenberger also made notes of any comments the supervisors offered concerning the employees. He ultimately used these ratings and comments in determining whether to hire Melrose employees. The Respondent did not attempt to get any supervisory ratings from employers of non-Melrose applicants.

D. The Job Fairs

All Melrose employees were notified that there would be a job fair on December 28 for persons interested in applying for employment with the Respondent. A similar job fair was subsequently convened by the Respondent on January 4. Virtually, all Melrose applicants applied at these two sessions. At both job fairs each applicant was individually interviewed and rated on a scale of 0 to 3 by Respondent's interviewers. The Respondent also prepared interview sheets for each applicant and these were then placed inside the completed application form. The only two times the Respondent used interview sheets in considering applicants for hire were at the December 28 and January 4 job fairs. Subsequent interviews with applicants were not memorialized. The Respondent asserts that once a person was hired, if their file contained an interview sheet, it was destroyed. The Respondent also possessed the Melrose employees' personnel files which contained information about their past job performance. The Respondent used these files in assessing whether to hire Melrose employees. The Respondent did not seek to obtain similar information for non-Melrose applicants.

E. Summary of Initial Hiring

Immediately before the December sale there were approximately 140 Melrose employees working in bargaining unit positions. From December 31 until February 14 the Respondent operated the club at a reduced level. On February 14 the Respondent had its formal "grand opening" for the club. From that point forward the club was designed to operate at full capacity. When the Respondent took over the club on December 31, it employed 63 employees in bargaining unit positions. Of that number, 30 or 48.5 percent, had been Melrose unit employees as of December 30, 1996. An additional 108 Melrose employees who applied were never hired by the Respondent or their hire was delayed. It is undisputed that at no time has the Respondent employed as a majority of its unit employees former Melrose unit workers. Rosenberger acknowledged he was aware that if the Respondent hired a majority of its unit employees from the former Melrose unit employees, the Respondent would be legally obligated to recognize the Union for collective-bargaining purposes.[6] Rosenberger did discuss this point of law with Amarien Snell-Baldwin, who was then the Respondent's assistant director of human resources. Rosenberger did not detail in his testimony why they discussed the subject.

The 108 Melrose employees are alleged by the Government to have been refused employment by the Respondent so it would not have to recognize the Union as its employees' bargaining representative. The Respondent asserts that it hired the best-qualified persons from its pool of applicants. It asserts that a worker's status as a union-represented Melrose employee was not considered in making hiring decisions.

F. Subsequent Hiring

The Respondent has engaged in constant hiring since the job fairs. On January 6 Rosenberger returned to his office in Pine-

[4] All dates refer to the period November 1996 through May 1997 unless otherwise stated.

[5] All regular full-time and regular part-time hourly employees employed at Respondent's Daufuskie Island, South Carolina, and Salty Fare Landing on Squire Road, Hilton Head, South Carolina locations, but excluding all temporary employees, office clericals, confidential employees, guards, and supervisors as defined in the Act.

[6] See, e.g., *Fall River Dyeing Corp. v. NLRB,* 482 U.S. 27 (1987); *NLRB v. Burns Security Services,* 406 U.S. 272 (1972); *Holly Farms Corp. v. NLRB,* 48 F.3d 1360, 1365 (4th Cir. 1995).

hurst, North Carolina, but continued to approve all Daufuskie Island hiring decisions by telephone. Rosenberger personally approved the hire of all employees employed from the December 31 startup until February 10, when Mary Ellen White, the club's new human resources director, was hired. White had previously worked in the same capacity for Melrose. Once White started working for the Respondent she was authorized to hire persons who had not previously worked for Melrose. Rosenberger, however, retained the authority to approve the hiring of any former Melrose employees. White would, thus, call Rosenberger at his office in Pinehurst, North Carolina, to obtain approval to hire a former Melrose employee. This arrangement lasted for a couple of months after February 10. White's testimony of this practice contradicted that of Rosenberger. He stated that White did all of the hiring once she was retained by the Respondent on February 10. Considering the demeanor of the witnesses, and the record as a whole, I credit White's version that she specifically needed Rosenberger's approval to hire former Melrose employees for approximately 2 months after she was hired. The Respondent offered no explanation why there was a disparity in hiring approval for Melrose employees.

The Respondent has had continuous difficulty in staffing its Daufuskie Island operations. This is in part attributable to the 55-minute boat trip required of its employees. A second problem is the competition for service workers in the geographic area. Daufuskie Island contains a competing resort, Haig Point, which requires similar staffing. More importantly, employers at the well-known Hilton Head Island resort have need for many more such employees. Workers on Hilton Head are not faced with a boat ride to get to work. To meet its employment needs the Respondent constantly places newspaper advertisements seeking workers. The Respondent has also used temporary employment services to provide it with help. Additionally, the Respondent offers its own employees a monetary bonus for any workers they recommend that are hired. This bounty does not apply for recommendations of former Melrose employees.

G. Recreation of the Melrose Employee Ratings

On January 24, 1997, the Union filed the unfair labor practice charge in this case. According to Rosenberger he discovered in mid-February that his rating sheets of the Melrose employees had gone missing from a box locked in an office at Salty Fare. To rectify the loss of the ratings, Rosenberger and Respondent's counsel, Christopher Terrell, went to Daufuskie Island in March to recreate the ratings. They met individually with the former Melrose supervisors who had been retained by Respondent. Rosenberger then prepared new evaluation summaries from this second series of supervisory interviews. (G.C. Exh. 25.)

III. TESTIMONY OF DISCRIMINATORY REFUSAL TO HIRE

Several witnesses testified regarding the Respondent's discriminatory efforts to avoid the Union by not hiring Melrose employees as a majority of its new unit work force. Some of the witnesses were Melrose employees. Three other witnesses were Respondent's former supervisors. These latter witnesses testified to statements by Respondent's managers that the hiring of Melrose employees would be calculated to preclude having to recognize and bargain with the Union.

A. Michael Brunson

Michael Brunson was Melrose's accounting manager. He was hired by the Respondent and promoted to controller. Brunson was subsequently terminated by the Respondent. His offices were at Salty Fare Landing where Amarien Snell-Baldwin, Melrose's acting human resources director, also worked. In about the third week of December she asked Brunson to prepare a computer printout of the Melrose employees for Rosenberger's use in making hiring decisions. Brunson recalled that shortly thereafter he was in a meeting with Snell-Baldwin and some other supervisors—Richard Vaughan,[7] Grant Tuttle, and Dan Hemmerle. Snell-Baldwin said that Rosenberger wanted her to identify the "undesirable" employees, i.e., the "most vocal and outspoken employees in favor of the Union." Brunson observed that a mark was made next to the names of such "undesirable" employees on the computer list. He subsequently observed the list of employees' names on Snell-Baldwin's desk with notations made next to the names.

Tuttle, who was hired as the Respondent's transportation manager, was called as a witness on behalf of the Respondent. He was not asked about the meeting with Snell-Baldwin. Hemmerle was hired by the Respondent as its golf course maintenance manager. The Respondent did not call him to testify. His absence was not explained. Snell-Baldwin conceded that Rosenberger had asked her for lists of employees. She denied ever asking department heads to identify union employees. Snell-Baldwin did admit that she asked them to identify undesirable employees that the Respondent would not want to hire. I find that Snell-Baldwin was performing as the Respondent's agent during this period as she was acting pursuant to Rosenberger's directions to assemble information about the Melrose employees.

Brunson also recalled conversations with Snell-Baldwin in mid-December when she told him that she would not be able to hire all of the Melrose employees, "Because of the Union issue." Brunson also recalled having frequent subsequent discussions with Snell-Baldwin, who at the time was Respondent's assistant director of human resources. She voiced her frustration about being asked to hire large numbers of employees and most of the applicants she was getting were former Melrose employees. Snell-Baldwin complained that she had been instructed by Rosenberger and Louis Lanzino, Respondent's general manager, not to hire former Melrose employees. She was particularly concerned about getting help in food, beverage, and housekeeping positions. Snell-Baldwin told Brunson that the most qualified applicants she had were former Melrose employees but she had been instructed not to hire them because of the Union issue. Snell-Baldwin denied that Rosenberger, or anyone else, told her that she could not hire Melrose employees who supported the union.

Brunson was a credible and forthright witness who was meticulous in attempting to state the facts to the best of his recall. His demeanor was impressive. Snell-Baldwin's demeanor was not persuasive. She shaded her testimony and her distaste for the Union was palpable. I have also taken into consideration the failure of Hemmerle and Tuttle to testify concerning their meeting with Snell-Baldwin. I credit Brunson's testimony concerning his conversations and meetings with Snell-Baldwin.

On December 28, Brunson attended the Respondent's job fair. During a break in the interview sessions he had a conver-

[7] Vaughan's testimony and credibility are discussed below.

sation with Rosenberger and Snell-Baldwin. Rosenberger made the statement that after the property changed ownership the Respondent, "Would not have to worry about the Union anymore . . . that the Union was not going to be a factor." Rosenberger concedes he made statements to the effect that the union was not an issue at the club. He explained this as meaning the employees seemed dissatisfied with the Union and it was their choice.

After Respondent's December 31 takeover of the club, Brunson recalled hearing both Rosenberger and Lanzino say that, aside from the initial Melrose employees hired, no additional Melrose employees would be employed by the club. Lanzino did not testify at the hearing. The Respondent did not explain why Lanzino did not testify. I find Brunson's testimony regarding Lanzino's statements to be credible and uncontroverted. Rosenberger denied ever saying that Melrose employees could not be hired because of the union matter. He also testified that Melrose employees' union affiliation was not of concern to him. Rosenberger's demeanor was not convincing, especially when testifying that the union was of no concern to him. I credit Brunson regarding Rosenberger's statements that additional Melrose employees would not be hired.

B. Arthur (Butch) Mobley

Arthur (Butch) Mobley, a Melrose supervisor, was hired by the Respondent as director of engineering. He worked from January until he was discharged on October 9, allegedly for falsifying employee timecards.

In November and December 1996, Ernest Yarborough, Respondent's director of maintenance for the eastern division of CCA, visited the Daufuskie Island facility and talked to Mobley. Mobley testified that Yarborough was concerned about Melrose being union and said that the Respondent had no unions at any of its clubs. Yarborough questioned Mobley about how many of his men were affiliated with the Union. Yarborough said that the Respondent was "totally opposed" to unions and in his opinion the Respondent would not take over the club if there was a union there. Yarborough did not testify at the hearing and his absence was not explained by the Respondent.

Mobley also related how he had heard Snell-Baldwin discuss which of Respondent's employees supported the Union. She told him that the Respondent knew which employees were union members, and that supervisors, "were to stay away from them, that their time would come. They were hired back by mistake." Mobley also recalled Snell-Baldwin referring to the union employees as "troublemakers." Although Snell-Baldwin was Respondent's witness during the hearing, the Respondent did not recall her to rebut Mobley's testimony concerning her statements. The Respondent offered no explanation for the failure to recall Snell-Baldwin.

Mobley was not an entirely forthright witness. He was evasive when questioned about his termination. He conceded that he did not agree with his discharge, but testified that did not influence his testimony. I have taken into consideration Mobley's less than candid testimony regarding his discharge and the likelihood of his bias towards the Respondent because of his discharge. I have also considered Mobley's credible demeanor when testifying to the events regarding Yarborough and Snell-Baldwin, as well as the detail of that testimony. Likewise, I have weighed the fact that his testimony was uncontroverted by Yarborough or Snell-Baldwin. On balance, I credit Mobley's testimony regarding the antiunion expressions by these two agents of the Respondent.[8]

Mobley attended management meetings held by the Respondent in January–April 1997 at which union activity at the club was discussed. Mobley described how in these meetings Human Resources Director Mary Ellen White apprised the supervisors of the exact numbers of "union" employees who had been hired. White instructed the supervisors to stay alert for any union activity among the employees and to report anything they learned. White admitted that manager meetings were regularly held by the Respondent, but denied that the subject of unions was ever discussed in such meetings. White did not deny telling the managers at these meetings of the number of union employees hired by the Respondent. I credit Mobley that White kept the supervisors informed of the numbers of Melrose employees being hired at the club.

Mobley recalled a meeting of department heads and managers conducted by Rosenberger in February or March. Rosenberger told the assemblage that the Respondent did not have unions at other clubs and did not think the Union would be a problem at Daufuskie Island. Rosenberger told the supervisors to avoid becoming involved with the subject of union activity and report any information about union activity. Rosenberger denied making any antiunion comments to Mobley or anyone else.

The remarks attributed to Rosenberger by Mobley, i.e., not thinking the union would be a problem at Daufuskie, are similar to statements Rosenberger admitted he made. Rosenberger explained the statements as being based on his belief that many of Respondent's employees would not be interested in the Union. I credit Mobley that Rosenberger did repeat such a statement in the supervisory meeting.

C. Richard Vaughan

1. Conversations with Snell-Baldwin

The Respondent hired Melrose Supervisor Richard Vaughan to continue as the club's food and beverage director. Vaughan worked for the Respondent until May 1997 when he voluntarily quit in order to start his own restaurant. In January and February he was attempting to staff his operations for the Respondent's major opening on February 14. In an effort to complete the process he had several conversations with Snell-Baldwin. She told Vaughan that Rosenberger had the final say as to which Melrose employees would be hired. She stated that Rosenberger was being very tight with her and only allowing her to hire back a certain amount of former Melrose employees. Snell-Baldwin expressed concerns about hiring too many "old faces" because the Respondent could be forced to recognize the Union. She said there were a certain number of Melrose employees the Respondent had to stay below and at that time that number was down to a single digit. Vaughan told Snell-Baldwin he did not have enough employees and told her there were Melrose employees he wanted to hire. Snell-Baldwin said that the hiring was up to Rosenberger. Snell-Baldwin testified that Rosenberger never said anything to her about being careful in hiring former Melrose employees.

[8] *Champion Papers, Inca v. NLRB,* 393 F.2d 388, 394 (6th Cir. 1968) ("A factfinder—jury, judge or administrative agency—is not barred from finding elements both of truth and untruth in a witness' testimony"); *PBA, Inc.,* 270 NLRB 998 fn. 1 (1984).

I found Snell-Baldwin's demeanor demonstrative of a witness who was crafting her testimony to put the best light on her conduct. Vaughan's demeanor was persuasive, and as detailed below, I credit his testimony.

2. Telephone conversations with Rosenberger

In January, Vaughan called Rosenberger at his Pinehurst office to discuss the hiring situation. Vaughan named several Melrose employees he wanted to hire. Rosenberger told him he could not hire them at that time because the Respondent wanted "new blood." Vaughan remembered that Rosenberger said, "Everyone else I was told just to put on hold that we still did not have the proper mix of new verses old." Rosenberger said they needed to be careful who was hired, that there were reasons they needed to hire a certain amount of "new faces." Rosenberger recalled having telephone conversations with Vaughan who was anxious about getting more help. Rosenberger could not recall if Vaughan specifically mentioned Melrose employees he wanted to hire. Rosenberger states he denied the request for additional help because it was a question of budget and he was concerned about "numbers and positions."

I did not find Rosenberger a credible witness and his testimony did not engender trustworthiness. On demeanor grounds alone I do not credit his testimony where it conflicts with others.

3. Conversations with fellow managers

Vaughan also discussed the hiring situation with other of Respondent's supervisors. Specifically he talked to Dana Buckett, rooms division director, who had to hire temporary employees because she could not get enough help. Dan Hemmerle is the Respondent's head groundskeeper and he expressed to Vaughan his concern about not having enough help to maintain the golf course operations. Both Buckett and Hemmerle expressed the sentiment that it was a shame that the "union thing" was keeping them from hiring Melrose employees. Buckett was called as Respondent's witness but was not asked about this conversation with Vaughan. Hemmerle did not testify at the hearing. His absence was not explained. I credit Vaughan's recitation of these conversations with other of Respondent's supervisors.

4. Further observations of Vaughan' credibility

While I have credited Vaughan's testimony, his credibility is not without tarnish. Vaughan's wife was also Respondent's employee and was discharged by the Respondent. Apparently that parting was not amicable. The result was that the Vaughans sent a box of horse manure to Ken Crow, Respondent's club manager. Such conduct exhibits a bias against the Respondent that I have weighed heavily in considering Vaughan's credibility.[9] Despite his conduct, Vaughan's demeanor and detailed testimony about Respondent's hiring practices impressed me as truthful. As noted, much of Vaughan's testimony was uncontroverted by Respondent's witnesses. Importantly, Vaughan's testimony was also supported by other witnesses. Similar antiunion conduct of the Respondent was described by former supervisors Brunson and Mobley whose testimony is discussed above. Additionally, several Melrose employees gave uncontroverted testimony about Vaughan's admissions concerning hiring made while he was still Respondent's agent:

> 1. Melrose employee Amarie Powers had a telephone conversation with Vaughan in the second week of February. Powers was inquiring about being hired to work for the Respondent. Vaughan told her that the Respondent wanted "new blood." When Powers questioned him about what he meant, Vaughan told her the Respondent did not want to hire "too many" Melrose employees.
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> 2. Sharon Zetterholm, another Melrose employee, telephoned Vaughan on approximately January 20 to inquire about being hired. He said that the Respondent was looking for all "new faces." Zetterholm was not hired.
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> 3. Dezeree Nelson received a letter from the Respondent that her application was being considered. After she did not hear anything further she called Vaughan in January. He told her that they were looking for "new faces."

In light of the credibility findings contained herein, and the record as a whole, I find that Vaughan's, as well as other supervisors,' references to "new blood" and "new faces" are euphemisms for non-Melrose employees whose hiring would not require the Respondent to recognize the Union. *Cable Car Charters,* 322 NLRB 554, 568 (1996); *D & K Frozen Foods,* 293 NLRB 859, 872 (1989); *Regency Manor Nursing Home,* 275 NLRB 1261, 1278 (1985).

Melrose employees Amarie Powers and Eric Coney also had a conversation with Vaughan after he quit work for the Respondent. The two employees were at Vaughan's restaurant during the second week of June. Powers asked Vaughan why she had not been hired by the Respondent. Vaughan said he was sorry that she was not hired but they could only employ a certain number of Melrose employees. He told her this was so because if the Respondent hired more it would have to recognize the Union.

Vaughan's June statement would not normally be considered a party's admission because he was no longer employed by the Respondent. *Southern Maryland Hospital Center,* 288 NLRB 481 fn. 1 (1988); Fed.R.Evid. 801(d)(2)(D). It is noted, however, that no hearsay objection was made to Coney and Powers' testimony. Thus any hearsay claim is waived. *NLRB v. Cal-Maine Farms,* 998 F.2d 1336, 1343 (5th Cir. 1993); *Iron Workers Local 46,* 320 NLRB 982 fn. 1 (1996). Vaughan did not deny the conversation. The June dialogue is also corroborated by the employees' testimony of Vaughan's similar earlier statements, made while he was Respondent's agent. In those statements he expressed the Respondent's commitment to get "new faces" and avoid hiring "too many" Melrose employees. I find that Vaughan's June statement does have probative reliability. *Richardson v. Perales,* 402 U.S. 389, 402 (1971) (Hearsay evidence may be considered by appellate court in

[9] The sequestration rule was invoked at the start of the hearing. *Greyhound Lines,* 319 NLRB 554 (1995); Fed.R.Evid. 615. After Vaughan testified he discussed some of the questions he had been asked during his examination with Snell-Baldwin, who was one of the Respondent's witnesses. As a result, the Respondent moved to strike his testimony. Vaughan's discussion of his testimony was improper and I have considered this conduct in evaluating his credibility. The Respondent does not specify how Vaughan's breach of the rule may have prejudiced its case. The Respondent does not argue that Snell-Baldwin, its own cooperative witness, was improperly influenced by what she learned from Vaughan. The Respondent's motion to strike Vaughan's testimony is thus denied. *Continental Winding Co.,* 305 NLRB 122, 129 (1991); *Unga Painting Corp.,* 237 NLRB 1306 (1978).

determining whether "substantial evidence" supports agency decision.); *Iron Workers Local 46,* supra; *Dauman Pallet,* 314 NLRB 185, 186 (1994).

I find the admissions of Vaughan and the other supervisors are probative of the Respondent's unlawful motivation for not hiring Melrose employees. *Triple A Services,* 321 NLRB 873, 873 (1996) (Statements on intent not to hire union employees, "manifest the clear and unlawful intent to hire less than half of the [predecessor's] work force in order to avoid successorship status."). See also *Western Plant Services,* 322 NLRB 183, 194–195 (1996); *Pace Industries,* 320 NLRB 661, 661 (1996), enfd. 118 F.3d 585 (8th Cir. 1997); *U.S. Marine Corp.,* 293 NLRB 669, 671 (1989), enfd. 944 F.2d 1305 (7th Cir. 1991), cert. denied 503 U.S. 936 (1992). I find, based on the credited admissions of Respondent's agents, that the Respondent has violated Section 8(a)(1) and (3) of the Act by refusing to hire the Melrose employees.

IV. ADDITIONAL EVIDENCE OF DISCRIMINATORY MOTIVATION

In addition to the testimony of the witnesses cited above, I find there are also other reasons to conclude that the Respondent unlawfully discriminated against Melrose employees.

A. Respondent's Union Policy

Respondent maintains a written policy regarding unions. This statement is contained in materials given to each new employee. The Respondent's declaration reads:

> We are committed to keeping a union-free environment, dealing with people directly rather than through a third party. We believe we can continue to be union-free by using existing policies and practices to resolve problems. Employee Partners are encouraged to approach their supervisor or anyone else in a position to help with problems or concerns. [G.C. Exh. 20.]

I emphasize that Respondent's union-free policy statement is not unlawful nor evidence of union animus for purposes of proving violations of the Act. Section 8(c) of the Act protects an employer when voicing such noncoercive views about unions.[10] I have, however, taken this policy into consideration in assessing Rosenberger's credibility. Rosenberger denied that the union representation of Melrose employees played any part in his hiring decisions. Rosenberger admits, however, knowing that if he hired a majority of his unit workers from the Melrose employees, his employer would have to recognize the Union. He also admits telling supervisors that the Union would not be a factor at the club under the Respondent's ownership. He attributes this remark to his understanding that there was employee dissatisfaction by Melrose employees with union representation. Based on his demeanor, and the record as a whole, I do not credit Rosenberger's denial that Melrose employees' union representation was a consideration in making hiring decisions.

[10] 29 U.S.C. § 158(c): "The expression of any views, arguments, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit." The Supreme Court has noted this section "merely implements the First Amendment." *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 617 (1969).

B. Supervisors' Contradictory Testimony About Special Hiring Approval for Melrose Employees

Another reason Rosenberger is not credited is the conflict in the testimony between him and his subordinate, White, as to who controlled the hiring. As related above, Rosenberger claimed that once White was hired on February 10 she did all the hiring. In contrast, White's credited testimony shows that when she commenced employment she was only authorized to hire non-Melrose employees. When it came to hiring Melrose employees, White was required to call Rosenberger in North Carolina and get his approval. This approval procedure for Melrose employees lasted approximately 2 months. Neither Rosenberger, nor any other witness, explained why this disparate approval system was in place for the hiring of Melrose employees.

The Respondent's disparate approval procedure for Melrose employees is material evidence that it did not consider them for hire on a comparable basis with other applicants. Such unequal treatment is strong evidence of discriminatory motive. *Monfort of Colorado,* 298 NLRB 73, 81 (1990), enfd. in pertinent part 965 F.2d 1538 (10th Cir. 1992), citing *Spencer Foods,* 268 NLRB 1483, 1486 fn. 10 (1984), enfd. as modified sub nom. *Food & Commercial Workers Local 152 v. NLRB,* 768 10 F.2d 1463 (D.C. Cir. 1985).

C. Respondent's Need for Workers

Rosenberger admitted that no Melrose applicant was totally rejected for employment with the Respondent. Thus the Respondent sent each Melrose applicant who was not hired the following letter:

> We appreciate your interest in employment with the Daufuskie Island Club and Resort. We are unable to extend an offer to you at this time. Please be advised that we will keep your application on file for future reference should a suitable position become available. [G.C. Exh. 23.]

The Respondent also concedes that Melrose employees would be considered for employment in jobs other than those they occupied at Melrose.

The Respondent has had a continuous need for workers at its relatively isolated island resort. A ready work force was in place when it took over the club's operations. Yet that work force was, in most instances, rejected notwithstanding a serious problem of obtaining help and despite telling Melrose employees they would be considered for "suitable positions." Respondent's ignoring of many experienced Melrose employees is a further indication of its discriminatory motive. *NLRB v. Foodway of El Paso,* 496 F.2d 117, 119 (5th Cir. 1974) (One factor court considered in finding violation of Act was, "Despite the presence of a pool of experienced workers, respondent went to considerable length to replace the union workers with entirely new workers.").

D. Disparate Hiring Criteria for Melrose Employees

In anticipation of applications from the Melrose employees, the Respondent had Melrose supervisors rate each of these workers. These ratings were allegedly a major basis for determining whether a Melrose employee would be hired. Only Melrose employees were so evaluated. The Respondent made no attempt to obtain supervisory ratings for non-Melrose employees who sought work. Moreover, the Respondent examined the Melrose personnel files of applicants to see if they would be hired. This

included scrutinizing copies of the disciplinary notices issued by Melrose. The Respondent made no attempt to get such information about non-Melrose applicants.

The Respondent did not offer evidence that the non-Melrose employees hired were superior in qualifications to the alleged discriminatees. This lack of proof weakens its argument that it acted with lawful motive. *NLRB v. CWI of Maryland, Inc.,* 127 F.3d 319, 329–330 (4th Cir. 1997). The Respondent's defense centered upon attempting to show that the Melrose applicants not hired were rated poorly by their supervisors. Yet even here there were discrepancies. Some Melrose employees were hired despite poor supervisory ratings (Trudy Crapse O+; Matthew Edwards O; Elisabeth Yarborough 1+; R. Exh. 157). The Respondent claimed these hires were "mistakes" but provided no evidence to support that claim.

An employer acts unlawfully if it disparately applies hiring criteria to union employees. *Monfort of Colorado,* 298 NLRB 73 (1990), enfd. in pertinent part 965 F.2d 1538 (10th Cir. 1992). In *Monfort,* the employer scrutinized the union employees' personnel records in deciding whether to hire them. In contrast, other applicants' employment histories were accorded only minimal review. The company was found to have violated the Act because of the "markedly disparate ways in which [it] used prior employment history as a basis for disqualifying former employee applicants." The Board also rejected Monfort's argument that it would be unreasonable for it to overlook relevant information about former employees' previous employment, in light of the employer's lack of concern for obtaining comparable information regarding nonunion applicants. 298 NLRB at 80-81. *Galloway School Lines,* 321 NLRB 1422, 1424 (1996) (New hiring process was specifically developed in response to fact that predecessor employees would be applying.); *Pace Industries,* 320 NLRB 661, 661–662 (1996), enfd. 118 F.3d 585 (8th Cir. 1997) (High standards of preemployment screening applied to exclude former employees from employment so as to avoid recognizing union.); *Fluor Daniel, Inc.,* 311 NLRB 498, 499, 505–506 (1993), modified 102 F.3d 818 (6th Cir. 1996) (Employer unlawfully required more stringent test for union applicants and applied disparate standards for hiring based on the tests). The Respondent's disparate hiring criteria applied to Melrose employees are substantial evidence of its unlawful discriminatory motive to avoid the Union. I find that the Respondent did disparately assess Melrose employees in an effort to restrict the numbers of union employees it hired.

The Respondent argues that certain alleged discriminatees did not submit applications, and thus should be dismissed from the complaint. I reject this argument because there was a question at trial as to whether the Respondent had produced all of the applications received from Melrose employees. The Respondent represented only that it made available all of the applications it was able to find. Thus, it has not been shown that the applications produced reliably constitute all applications submitted to the Respondent. Additionally, the record shows that the Respondent did not always require that an application have been on file for persons it hired. (No applications for Edwards, Ladson, Washington, and Williams (R. Exh. 157)); applications dated after the date of hire for Aiken, Briney, Lynn Brown, Buckett, Butler, Anthony Fields, Hamilton, Hedrick, and Townsend (G.C. Exhs. 342–343). Any uncertainty in determining whether applications were received or were ultimately relevant in deciding who would be hired should be held against the party whose unlawful conduct gave rise to the uncertainty. I find that the Respondent may not rely on the alleged lack of applications to reject any of the discriminatees for employment. *Shortway Suburban Lines,* 286 NLRB 323, 326 (1987), enfd. 862 F.2d 309 (3d Cir. 1988).

The complaint alleges the Respondent unlawfully denied 108 Melrose employees employment. Where a successor employer's own unlawful hiring scheme gives rise to uncertainty as to whether a particular predecessor employee would have been hired, it is appropriate that the uncertainty be resolved against the wrongdoer. *Western Plant Services,* 322 NLRB 183, 195 (1996); *State Distributing Co.,* 282 NLRB 1048, 1048–1049 (1987). See also *Love's Barbeque Restaurant,* 245 NLRB 78, 82 (1979), enfd. in relevant part sub nom. *Kallman v. NLRB,* 640 F.2d 1094 (9th Cir. 1981) (Where successor engages in discriminatory refusal to hire, Board infers that all former employees would have been retained absent the unlawful discrimination.). I find that the Respondent deliberately refused to hire a certain percentage of Melrose employees in order to avoid the Union and that all 108 discriminatees are entitled to reinstatement as set forth below.

V. CONCLUSION AS TO THE REFUSAL TO HIRE ALLEGATION

An employer that takes over the operations of a predecessor is normally free to hire whomever it wishes. As the Supreme Court has stated, however, this right is not without limitation:

> [I]t is an unfair labor practice for an employer to discriminate in hiring or retention of employees on the basis of union membership or activity. . . . Thus, a new owner could not refuse to hire the employees of his predecessor solely because they were union members or to avoid having to recognize the union. [*Howard Johnson Co. v. Hotel & Restaurant Employees,* 417 U.S. 249, 262 fn. 8 (1974).]

The General Counsel has the initial burden of establishing that union or other protected activity was a motivating factor in Respondent's action alleged to constitute discrimination in violation of Section 8(a)(3). *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983); *FPC Holdings, Inc. v. NLRB,* 64 F.3d 935, 942 (4th Cir. 1995).

The Board assesses refusal to hire cases in successor situations on the following basis:

> Within the *Wright Line* framework, there are several factors which the Board has considered in analyzing the lawfulness of the alleged successor's motive: expressions of union animus; absence of a convincing rationale for the failure to hire the predecessor's employees; inconsistent hiring practices or overt acts or conduct demonstrating a discriminatory motive; and evidence supporting a reasonable inference that the new owner conducted its hiring in a manner precluding the predecessor's employees from being hired in a majority of the new owner's overall work force. [*Galloway School Lines,* 321 NLRB 1422, 1423–1424 (1996).]

In the instant case the Respondent undisputedly had knowledge of the Melrose employees' union representation. The Respondent's statements that it was not going to hire a majority of the Melrose employees in order to avoid the duty to bargain are distinct evidence of union animus. Additionally, the disparate hiring criteria the Respondent used to evaluate Melrose employees, and the other evidence cited above, is demonstrative of animus and unlawful motivation. Based on the record as a

whole, the Government has shown by a preponderance of the evidence that the Respondent engaged in a planned course of conduct calculated to unlawfully restrict the number of Melrose employees it hired. This plan was motivated by the Respondent's desire to avoid having to recognize and bargain with the Union at its Daufuskie Island operations. The Respondent has not proven its affirmative defense that the alleged discriminatory refusal to hire would have taken place even in the absence of the Melrose employees' protected activity. I find that the Respondent's discriminatory refusal to hire certain Melrose employees is a violation of Section 8(a)(1) and (3) of the Act.

VI. SUCCESORSHIP

The Government alleges the Respondent would be the legal successor to Melrose, but for its unlawful refusal to hire the discriminatees. A finding of successorship rests on, inter alla, "continuity of the employing industry." *Fall River Dyeing Corp. v. NLRB,* 482 U.S. 27 (1987); *Holly Farms Corp. v. NLRB,* 48 F.3d 1360, 1363–1365 (4th Cir. 1995). In determining whether there is continuity, the emphasis is on the effect of changes on employees' jobs and whether employees will view their job situation with the successor as essentially unaltered. *Fall River,* supra.

Rosenberger admitted that the Respondent would have had to recognize the Union if the Respondent hired a majority of the Melrose employees. The Respondent has admitted that the bargaining unit is appropriate for the purposes of collective bargaining. Beyond these admissions there is the record evidence that the Respondent was the legal successor to the Melrose Club. The Respondent purchased the entire club and continues to run it as a resort. Many of the Melrose supervisors were hired to run the Respondent's operations. The employees' job classifications and work are similar to the Melrose operations. In sum, the Respondent has continued to operate the business of the predecessor in essentially unchanged form. The Respondent's purported emphasis on attempting to attract more of the public to the club is not a substantial change in operations that altered the essential nature of the employees' jobs. *Clarion Hotel-Marin,* 279 NLRB 481, 489–490 (1986), enfd. 822 F.2d 890 (9th Cir. 1987) (Successor hotel's change of emphasis from family to convention business, and change of some job titles, had minimal effect on the work force.); *Premium Foods,* 260 NLRB 708, 715 (1982), enfd. 709 F.2d 623 (9th Cir. 1983) (Successor's changes in product lines and clientele held not a defense to finding of successorship.). I find that the Respondent is the successor to the Melrose Club.

VII. THE LEGAL EFFECT OF SUCCESSORSHIP

The Respondent's unlawful refusal to hire Melrose employees precluded a majority of its work force from being composed of the predecessor's employees and, therefore, prevented the Respondent from otherwise becoming the legal successor to Melrose. *U.S. Marine Corp.,* 293 NLRB 669, 670–671 (1989), enfd. 944 F.2d 1305 (7th Cir. 1991). If a successor employer unlawfully refuses to hire predecessor employees, there is a presumption that the union's status as the majority representative of the employees would have continued. *NLRB v. Foodway of El Paso,* 496 F.2d 117 (5th Cir. 1974); *Sierra Realty,* 317 NLRB 832, 835 (1995), enf. denied 82 F.3d 494 (D.C. Cir. 1996), citing *Love's Barbeque Restaurant,* 245 NLRB 78, 82 (1979), enfd. in relevant part sub nom. *Kallman v. NLRB,* 640 F.2d 25 1094 (9th Cir. 1981). Because of its unlawful refusal to hire the discriminatees, I find that the Respondent is obligated to recognize and bargain with the Union as the representative of its employees. *NLRB v. Burns Security Services,* 406 U.S. 272 (1972). The Respondent's refusal to bargain with the Union is a violation of Section 8(a)(1) and (5) of the Act.

Where an employer unlawfully discriminates in its hiring in order to evade its obligations as a successor, it does not have the otherwise normal right of a successor to set initial terms of employment without first consulting with the Union. *Advanced Stretchforming International, Inc.,* 323 NLRB 529 (1997). It is unlawful for an employer to unilaterally change its employees' terms and conditions of employment if the employer has a legal duty to bargain with a union. *Holly Farms Corp. v. NLRB,* 48 F.3d 1360, 1368 (4th Cir. 1995). I find that the Respondent, because of its unlawful conduct, was not entitled to set the employees' initial terms of employment or make unilateral changes in their terms and of employment. By making such unilateral changes the Respondent has additionally violated Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. Daufuskie Club, Inc., d/b/a Daufuskie Island Club and Resort, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. International Union of Operating Engineers, Local 465, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.
3. The following unit is appropriate for collective-bargaining purposes:

> All regular full time and regular part time hourly employees employed at Respondent's Daufuskie Island, South Carolina, and Salty Fare Landing on Squire Road, Hilton Head, South Carolina, locations, but excluding all temporary employees, office clericals, confidential employees, guards, and supervisors as defined in the Act.

4. The Union is the Section 9(a) collective-bargaining representative of the above-described unit employees.
5. The Respondent is the successor employer of the employees in the above-described unit.
6. Respondent has violated Section 8(a)(1), (3), and (5) of the Act.
7. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent refused to consider for hiring and refused to hire former employees of the Melrose Club, I shall order that Respondent offer to the employees listed below immediate and full employment, without prejudice to their seniority and other rights previously enjoyed, discharging if necessary any employees hired in their place. If Respondent does not have sufficient positions available the remaining employees shall be placed on a preferential hiring list. The below listed employees shall be made whole for any loss of earnings they may have suffered due to the discrimination practiced against them. Backpay shall be computed in accordance with the formula approved in *F. W. Woolworth Co.,* 90 NLRB 289

(1950), with interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

On request, the Respondent shall bargain with the Union concerning wages, hours, and other terms and conditions of employment. Furthermore, in order to remedy the Respondent's unlawful unilateral changes, I shall order the Respondent, on request of the Union, to rescind any changes in employees' terms and conditions of employment unilaterally effectuated and to make the employees whole by remitting all wages and benefits that would have been paid absent the Respondent's unlawful conduct, until the Respondent negotiates in good faith with the Union to agreement or to impasse. As the Seventh Circuit stated in enforcing the Board's decision in *U.S. Marine,* a remedial measure of this kind not only is "designed to prevent [the Respondent] from taking advantage of its wrongdoing to the detriment of the employees . . . [but a] return to the status quo ante at least allows the bargaining process to get under way." Supra, 944 F.2d at 1322–1323. Employees shall be made whole in the manner prescribed in *Ogle Protection Service,* 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded,* supra. The Respondent shall also make whole its unit employees by making all delinquent employee benefit fund contributions, including any additional amounts due the funds in accordance with *Merryweather Optical Co.,* 240 NLRB 1213, 1216 fn. 7 (1979). In addition, the Respondent shall reimburse unit employees for any expenses ensuing from its failure to make the required contributions, as set forth in *Brad Plumbing & Heating,* 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service,* supra, with interest as prescribed in *New Horizons for the Retarded,* supra.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[11]

ORDER[12]

The Respondent, Daufuskie Club, Inc., d/b/a Daufuskie Island Club and Resort, Inc., Daufuskie Island, and Hilton Head, South Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to hire bargaining unit employees of the Melrose Club, the predecessor employer, because of their union-represented status in the predecessor's operation, or otherwise discriminating against employees to avoid having to recognize and bargain with the International Union of Operating Engineers, Local 465, AFL–CIO.

(b) Refusing to recognize and bargain in good faith with the Union as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

> All regular full time and regular part time hourly employees employed at Respondent's Daufuskie Island, South Carolina, and Salty Fare Landing on Squire Road, Hilton Head, South Carolina, locations, but excluding all temporary employees, office clericals, confidential employees, guards, and supervisors as defined in the Act.

(c) Unilaterally changing wages, hours, and other terms and conditions of employment of unit employees without first giving notice to and bargaining with the Union about these changes.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer to the following named unit employees of the predecessor, Melrose Club, who would have been employed by the Respondent but for the illegal discrimination against them, employment in its Daufuskie Island and Salty Fare Landing operations or, if such positions no longer exist, in substantially equivalent positions, without prejudice to their seniority and other rights and privileges previously enjoyed, discharging if necessary any employees hired in their place. If Respondent does not have sufficient positions available, the remaining employees shall be placed on a preferential hiring list. In addition, make whole the following named employees for any loss of earnings and other benefits they may have suffered by reason of the Respondent's unlawful refusal to employ them.

Tamia Bailey	Linda Griffin	Amarie Powers
Louis Beckett	Christine Hayes	Anthony Prisco
Phil Berkeley	Donnie Hobby	Kevin Reedy
Lindsay Bostick	Michelle Horne	Earnest Robinson
Elijah Bligen	Tracy Humbert	Clifford Sanders
Lee Boyles	Gregory Hutton	Edwin Shaw
Sandra Boyles	Bernice Jenkins	Eddie Simmons
Zigmond Braden	Tony Jenkins	Ife Simmons
David Brannon	Sydney Jones	Tanya Simmons
Juanita Bridges	Celeste Kaleimamahu	Alberta Singleton
Barbara Brown	Vera Kelly	Wade Sloman
Richard Brown	James Kendrick	Carol Smalls
Larry Bryant	John Kent	Derek Smalls
Travis Byson	Ray Ladson	Wayne C. Smalls
Annette Campbell	Monica Lee	Bonnie Smith
Doris Clark	Gail Magwood	Lisa Smith
James Collins	William Marquette	Louvenia Smith
Jacqueline Colquitt	Harvey F. Marriner	Shirley Smith
Eric Coney	John L. McCreight	Brandon Thomas
Tonya Coney	Donald McDonald	Adam Thompson
Thornell Coney	Rosalyn McGee	Amy Thompson
Keyawanda Cooper	Andre McKee	Calvin Thompson
Trudy Crapse	Lisa McKinney	Michelle Thompson
Isaiah Dawkins	Elaine Mincey	Jeffrey Toomey
Debra Decant	Jimmy Mincey	Catherine L. Utley
Janice Douberley	Herman Mitchell	Brenda Washington
Matthew Edwards	Walter Moon	Danielle White
Louisa Eyler	Valoroy Morris	Linda White
Leslie Ford	Dezeree Nelson	Tarhesha White
Joel Frank	Edythe Nelson (Hemmerle)	Maurice Williams
Shannon Gallagher	Michael Owens	Ray Williams
Kathy Gerald	Travis Painter	Ronald Willliams
Henry Gibbs	Larry Parks	Sharon Williams

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommend Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[12] The Government's unopposed motion to correct the transcript is granted. Tr. 2053, L. 14 correctly reads: ". . . Washington did not apply for work at Daufuskie Island Club and," and p. 2093, L. 21 correctly reads: ". . . the Eastern Division of CCA."

Arthur Gonzales	Larry Perkins	Peter Wong
Linda Green	Ken Pesta	Joann Young
Marshall Greene	Mae Belle Polite	Sharon Zetterholm

(b) Wthin 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire any of the above-named employees, and within 3 days thereafter notify these employees in writing that this has been done and that the refusal to hire them will not be used against them in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Recognize and, on request, bargain collectively with the union as the exclusive representative of the Respondent's unit employees, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed document.

(e) Notify the Union in writing that it recognizes the Union as the exclusive representative of its unit employees under Section 9(a) of the Act and will bargain with it concerning the terms and conditions of employment for employees in the appropriate unit.

(f) On request of the Union, rescind any departures from terms and conditions of employment that existed immediately prior to the Respondent's takeover of the predecessor's Melrose Club operation, retroactively restoring preexisting terms and conditions of employment, including wage rates and benefit plans, and make whole the bargaining unit employees by remitting all wages and benefits that would have been paid absent such unilateral changes from on December 31, 1996, until it negotiates in good faith with the Union to agreement or to impasse. Nothing in this order shall be construed to authorize or require the Respondent to withdraw any improved condition or to result in the employees' loss of any beneficial unilateral change.

(g) Within 14 days after service by the region, post at its facilities in Daufuskie Island and Salty Fare Landing, South Carolina, copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees, former employees employed by the Respondent at any time since December 31, 1996, and the above-named discriminatees. *Excel Corp.,* 325 NLRB 416 (1997).

[13] In the event that the Board's Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall be changed to read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights:

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize and bargain in good faith with the International Union of Operating Engineers, Local 465, AFL–CIO as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

> All regular full time and regular part time hourly employees employed at our Daufuskie Island, South Carolina, and Salty Fare Landing on Squire Road, Hilton Head, South Carolina, locations, but excluding all temporary employees, office clericals, confidential employees, guards, and supervisors as defined in the Act.

WE WILL NOT refuse to hire bargaining unit employees of Melrose Club, the predecessor employer, because of their union-represented status in the predecessor'' operation, or otherwise discriminate against employees to avoid having to recognize the Union.

WE WILL NOT change wages, hours, and other conditions of employment of the unit employees without bargaining about these changes with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL notify the Union in writing that we recognize it as the exclusive representative of our employees under Section 9(a) of the Act and will bargain with it concerning the terms and conditions of employment for our employees in the appropriate unit.

WE WILL within 14 days from the date of the Board's Order, offer

Tamia Bailey	Linda Griffin	Amarie Powers
Louis Beckett	Christine Hayes	Anthony Prisco
Phil Berkeley	Donnie Hobby	Kevin Reedy
Lindsay Bostick	Michelle Horne	Earnest Robinson
Elijah Bligen	Tracy Humbert	Clifford Sanders
Lee Boyles	Gregory Hutton	Edwin Shaw
Sandra Boyles	Bernice Jenkins	Eddie Simmons
Zigmond Braden	Tony Jenkins	Ife Simmons
David Brannon	Sydney Jones	Tanya Simmons
Juanita Bridges	Celeste	Alberta Singleton

	Kaleimamahu	
Barbara Brown	Vera Kelly	Wade Sloman
Richard Brown	James Kendrick	Carol Smalls
Larry Bryant	John Kent	Derek Smalls
Travis Byson	Ray Ladson	Wayne C. Smalls
Annette Campbell	Monica Lee	Bonnie Smith
Doris Clark	Gail Magwood	Lisa Smith
James Collins	William Marquette	Louvenia Smith
Jacqueline Colquitt	Harvey F. Marriner	Shirley Smith
Eric Coney	John L. McCreight	Brandon Thomas
Tonya Coney	Donald McDonald	Adam Thompson
Thornell Coney	Rosalyn McGee	Amy Thompson
Keyawanda Cooper	Andre McKee	Calvin Thompson
Trudy Crapse	Lisa McKinney	Michelle Thompson
Isaiah Dawkins	Elaine Mincey	Jeffrey Toomey
Debra Decant	Jimmy Mincey	Catherine L. Utley
Janice Douberley	Herman Mitchell	Brenda Washington
Matthew Edwards	Walter Moon	Danielle White
Louisa Eyler	Valoroy Morris	Linda White
Leslie Ford	Dezeree Nelson	Tarhesha White
Joel Frank	Edythe Nelson (Hemmerle)	Maurice Williams
Shannon Gallagher	Michael Owens	Ray Williams
Kathy Gerald	Travis Painter	Ronald Willliams
Henry Gibbs	Larry Parks	Sharon Williams
Arthur Gonzales	Larry Perkins	Peter Wong
Linda Green	Ken Pesta	Joann Young
Marshall Greene	Mae Belle Polite	Sharon Zetterholm

full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed dating from the time we should have hired them, dismissing, if necessary, any and all persons hired to fill such positions. If the Company does not have sufficient positions available, the remaining employees shall be placed on a preferential hiring list.

WE WILL make the above-named employees whole for any loss of earnings and other benefits resulting from our discriminatory refusal to hire them, less any net interim earnings, plus interest.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful refusal to hire the above-named employees, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the refusal to hire them will not be used against them in any way.

WE WILL recognize and, on request, bargain with the International Union of Operating Engineers, Local 465, AFL–CIO as the exclusive collective-bargaining representative of the employees in the above-described unit and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL on request of the Union, rescind any departures from terms and conditions of employment that existed immediately prior to the Respondent's takeover of the predecessor's Melrose Club operation, retroactively restoring preexisting terms and conditions of employment, including wage rates and benefit plans, and make whole the bargaining unit employees by remitting all wages and benefits that would have been paid absent such unilateral changes from on December 31, 1996, until we negotiate in good faith with the Union to agreement or to impasse.

DAUFUSKIE CLUB, INC., D/B/A DAUFUSKIE ISLAND CLUB AND RESORT, INC.